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Preparatory Commission for the International Criminal Court
Working Group on the Basic Principles Governing a Headquarters Agreement to be Negotiated Between the Court and the Host Country
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Basic principles governing an agreement to be negotiated between the International Criminal Court and the Kingdom of the Netherlands regarding the headquarters of the Court

Discussion paper proposed by the Coordinator

Preamble

The Assembly of States Parties,

Bearing in mind that, in accordance with article 3, paragraph 2, of the Rome Statute, the Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf,

Approves the following basic principles to govern the preparation of such a headquarters agreement:

I. General principles governing the headquarters agreement

1. Preparation of the headquarters agreement should be governed by the following general principles:

(a) Upon the establishment of the Court, the Government of the Netherlands and the Court should enter, as quickly as possible, into negotiations regarding the conclusion of the headquarters agreement by designating for this purpose their contact points and should proceed with these negotiations in an expeditious manner;

(b) The headquarters agreement should be based on the relevant provisions of the Statute, the Rules of Procedure and Evidence and the Agreement on the

Privileges and Immunities of the Court and should be consistent with those instrumen

(c) The headquarters agreement should reflect the specific relationship between the Court and the host country;

(d) The headquarters agreement should address in detail those issues which are not covered or are not sufficiently dealt with in the Statute, the Rules of Procedure and Evidence and the Agreement on the Privileges and Immunities of the Court, but are necessary for the proper implementation of the provisions set forth in those instruments;

(e) The headquarters agreement should be prepared in the light of its primary purpose of enabling the Court to fully and efficiently discharge its responsibilities and fulfil its purposes in the host country;

(f) The headquarters agreement should support the independence of the Court and provide for the long-term stability of the Court;

(g) The headquarters agreement should facilitate the smooth and efficient functioning of the Court, including, in particular, its needs with regard to all persons required by the Court to be present at its seat and with regard to the transfer of evidence in and out of the host country;

(h) The headquarters agreement should attempt, to the extent possible, to resolve in an all-encompassing manner all issues required to facilitate the smooth and efficient functioning of the Court; at the same time it should provide sufficient flexibility to allow for the conclusion of supplementary agreements on matters that were not foreseen during the negotiations of the agreement or are needed for the proper implementation thereof;

(i) The headquarters agreement should capitalize upon the relevant experience of international organizations and tribunals, and in particular with regard to operational issues, the experience of the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda;

(j) The headquarters agreement should ensure that the Court shall enjoy privileges, immunities and treatment that are no less favourable than those accorded to any international organization or tribunal located in the host country;

(k) The headquarters agreement should specify that the host country remains responsible for the fulfilment of all obligations under the headquarters agreement regardless of by whom those obligations are performed;

(l) The headquarters agreement should provide for its provisional application following the conclusions of negotiations between the Court and the Government of the Netherlands and pending the approval of the agreement by the Assembly of States Parties and the completion by the host country of its internal legislative procedures.

II. Specific principles governing the headquarters agreement

2. Part II contains principles on specific issues that need to be addressed in the headquarters agreement. The headquarters agreement may, however, deviate from the organizational structure used in this part.

Preamble

3. The preamble should refer, inter alia, to article 3, paragraphs 1 and 2, article 4, paragraph 1, and article 48 of the Statute. It should also highlight the main purpose of the agreement.

Use of terms

4. The article on the use of terms should include definitions, inter alia, of "the Statute", "the Court", "Rules of Procedure and Evidence", "Agreement on the Privileges and Immunities of the Court", "the premises of the Court", "the host country", "the competent authorities", "judges", "President", "the Presidency", "Prosecutor", "Deputy Prosecutors", "Registrar", "Deputy Registrar", "officials of the Court", "victim", "counsel", "States Parties", "Assembly", "representatives of States Parties" and "Vienna Convention".

5. Those definitions should be consistent with the Statute, the Rules of Procedure and Evidence and the Agreement on the Privileges and Immunities of the Court.

Legal status and juridical personality of the Court

6. Under this principle the headquarters agreement should refer to article 4, paragraph 1, of the Statute, which provides that the Court has international legal personality and also has such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

Premises of the Court

7. Under this principle, the headquarters agreement should refer to article 3, paragraph 1, of the Statute, which provides that the seat of the Court shall be established at The Hague in the Netherlands.

8. The headquarters agreement should contain provisions on inviolability of the premises of the Court providing, in particular, that:

(a) No official of the host country shall be allowed to enter the premises of the Court to perform any official duties unless permission has been given by the competent authorities of the Court;

(b) Judicial actions shall not be enforced on the premises of the Court;

(c) In case of fire or other emergency requiring prompt protective action, the consent of the Court to any necessary entry into premises by the competent authorities of the host country shall be presumed;

(d) The premises of the Court shall not become a refuge from justice.

9. The headquarters agreement should contain provisions on law and authority on the premises of the Court providing, in particular, that:

(a) The premises of the Court shall be under the control and authority of the Court;

(b) The Court shall have the power to make regulations operative within the premises and may expel or exclude persons from the premises for violation of its regulations;

(c) Except as otherwise provided in the headquarters agreement, the laws and regulations of the host country shall apply on the premises of the Court.

10. The headquarters agreement should contain provisions on protection of the premises of the Court providing, in particular, that the Government of the host country shall take all the effective and adequate measures necessary to ensure the security, safety and protection of the Court, its property, premises and the immediate vicinity of the Court and shall take the necessary measures to prevent impairment of the dignity and proper functioning of the Court.

11. The competent authorities of the host country shall ensure that the Court is not deprived of any part of its premises without its consent.

12. The competent authorities of the host country shall provide, if so requested by the Court, adequate police or security forces necessary to preserve law and order on the premises.

Privileges and immunities of the Court

13. Under this principle, the headquarters agreement should refer to article 48, paragraph 1, of the Statute, which contains the general principle governing the privileges and immunities enjoyed by the Court and provides that the Court shall enjoy in the territory of the host country such privileges and immunities as are necessary for the fulfilment of its purposes.

14. In addition, the headquarters agreement should include specific provisions providing that:

(a) The Court shall be entitled to display its flag, emblem and markings at its premises and on vehicles and other means of transportation used for official purposes;

(b) The Court and its property, funds and assets, wherever located and by whomsoever held, shall be immune from every form of legal process except insofar as in any particular case the Court has expressly waived its immunity (it being understood that no waiver of immunity shall extend to any measure of execution) and from search, seizure, requisition, confiscation, expropriation and any other form of interference by an executive, administrative, judicial or legislative body and shall be exempt from restrictions, regulations, controls or moratoria of any nature;

(c) The archives of the Court and in general all papers and documents in whatever form and other materials belonging to the Court wherever located and by whomsoever held shall be inviolable. The headquarters agreement shall provide for the application of any protective measures that the Court may order.

15. Furthermore, under this principle, the headquarters agreement should include the following specific provisions providing that:

(a) The Court's income, assets and other property and its operations and transactions shall be exempt from all direct taxes and the Court shall be exempt

from all customs duties, import turnover taxes and prohibitions and restrictions on imports and exports and in respect of its publications;

(b) The Court shall be exempt from taxes for purchases, for official use, of property, goods or services;

(c) The Court may receive, hold, use, transfer and convert funds, gold, securities or currency of any kind and shall in general enjoy freedom from any form of currency restrictions.

Communication facilities

16. Under this principle, the headquarters agreement should provide, in particular, that:

(a) The Court shall enjoy, for any form of its official communications and correspondence, treatment not less favourable than that accorded by the host country to any intergovernmental organization or diplomatic mission and no such official communication or correspondence shall be subject to censorship by the Government of the host country;

(b) The Court shall be entitled to use codes and cipher and to dispatch and receive correspondence and other material or communications either by courier or in sealed bags, all of which shall be inviolable and shall have the same privileges and immunities as diplomatic couriers and bags;

(c) The Court may use all appropriate means of communication and shall have the right to establish and operate at the premises of the Court its own sending and receiving broadcasting facilities and other telecommunications equipment, in accordance with the laws and regulations of the host country;

(d) The Court shall be exempt from the licensing restrictions and permit regime and any fees associated thereto;

(e) The Court shall have the right to publish freely and without restrictions within the host country in conformity with the headquarters agreement.

Public services for the premises of the Court

17. Under this principle, the headquarters agreement should include provisions providing, in particular, that:

(a) The competent authorities shall secure, upon the request of the Registrar or a duly authorized official acting on his/her behalf, the provision on equitable terms of public services needed by the Court and that, in cases where such services are made available to the Court by the competent authorities, or where the prices thereof are under their control, the rates for such services shall not exceed the lowest comparable rates accorded to essential agencies and organs of the Government, and in case of force majeure resulting in a complete or partial disruption of the aforementioned services, the Court shall for the performance of its functions be accorded the priority given to essential agencies and organs of the Government;

(b) Upon request of the competent authorities, the Court shall make suitable arrangements to enable duly authorized representatives of the appropriate public

services to inspect, repair, maintain, reconstruct and relocate utilities, conduits, mains and sewers on the premises of the Court under conditions that shall not unreasonably disturb the carrying out of the functions of the Court.

Privileges and immunities of judges, the Prosecutor, the Deputy Prosecutors, the Registrar and officials of the Court

18. Under this principle, the headquarters agreement should refer to article 48, paragraph 2, of the Statute, containing general provisions on the privileges and immunities enjoyed by the judges, the Prosecutor, the Deputy Prosecutors and the Registrar, and to article 48, paragraph 5, concerning waiver of such privileges and immunities.

19. The headquarters agreement's provisions concerning the privileges and immunities enjoyed by the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and officials of the Court should be consistent with those contained in the Agreement on the Privileges and Immunities of the Court and should reflect the specific relationship between the Court and the host country.

20. The headquarters agreement should specify, in particular, that the immunity from legal process in respect of words spoken or written and acts done by the judges, the Prosecutor, the Deputy Prosecutors and the Registrar in discharging their functions shall continue to be accorded notwithstanding that the persons concerned are no longer occupying these positions or performing those functions; the salaries, emoluments and allowances paid to the judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall be exempt from taxation; members of families of the judges, the Prosecutor, the Deputy Prosecutors and the Registrar forming part of their households and who do not have Netherlands nationality or permanent residence status in the host country enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents.

21. Under this principle, the headquarters agreement should also refer to article 48, paragraph 3, of the Statute of the Court and ensure that the Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry (hereinafter officials of the Court) shall enjoy in the host country the privileges and immunities and facilities necessary for the independent performance of their functions. The headquarters agreement should define which categories of staff and members of their family forming part of their household shall be accorded the privileges and immunities, exemptions and facilities as the Government of the host country accords to diplomatic agents of comparable rank within diplomatic missions established in the Netherlands.

22. Spouses and members of families of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and officials of the Court forming part of their household shall be entitled to seek employment in the Netherlands. The conditions for such employment shall be agreed upon between the Court and the competent authorities of the host country.

23. In the event the Court establishes its own social security regime, all persons to whom such a regime may apply shall be exempt from all compulsory contributions to the social security system of the Netherlands.

24. The headquarters agreement should include a provision for the avoidance of double contributions by persons to whom a social security scheme established by the Court may apply, pending the establishment of such a scheme.

25. The headquarters agreement should further provide that the judges, the Prosecutor, the Deputy Prosecutors and the Registrar and officials of the Court shall have the right of unimpeded entry into, exit from and movement within the host country, including unimpeded access to the premises of the Court, as appropriate and for the purposes of the Court.

Privileges and immunities of persons taking part in proceedings before the Court

26. The headquarters agreement should ensure that all persons taking part in proceedings before the Court enjoy privileges, immunities and facilities to the extent necessary for the independent performance of their functions or for their presence before the Court. These persons comprise: representatives of States participating in the proceedings of the Court, counsel and persons assisting defence counsel, witnesses, victims, experts and other persons who are required to be present at the seat of the Court.

27. The privileges, immunities and facilities to be accorded by the headquarters agreement to the persons referred to in paragraph 26 should be consistent with those contained in the Agreement on the Privileges and Immunities of the Court and should reflect the special relationship between the Court and the host country.

28. The headquarters agreement should, in particular, provide that persons referred to in paragraph 26:

(a) Shall be accorded privileges, immunities and facilities to the extent necessary for the independent performance of their functions or for their presence before the Court under the Statute and the Rules of Procedure and Evidence;

(b) Shall be accorded immunity from legal process of every kind in respect of words spoken or written and all acts performed by them in the course of the performance of their functions;

(c) Shall not be subjected by the host country to any measures that may affect the privileges, immunities and facilities referred to in subparagraph (a);

(d) Shall have the right of unimpeded entry into, exit from and movement within the host country, including unimpeded access to the premises of the Court, as appropriate and for the purposes of the Court, in accordance with the laws and regulations of the host country;

(e) Shall not be prosecuted or detained or subjected to any other restriction of their liberty by the competent authorities in respect of acts or convictions prior to entry into the territory of the host country;

(f) Shall, with the exception of representatives of States participating in or attending the proceedings, be provided by the Court with a certificate indicating their status, which shall be limited to a period required for the exercise of their functions or of the proceedings in question.

29. The headquarters agreement should provide that the host country shall not exercise its jurisdiction or proceed with a request for assistance or extradition from another State in respect of persons surrendered to the Court in accordance with Part 9 of the Statute or persons who appear before the Court pursuant to a summons to appear in accordance with article 58, paragraph 7, of the Statute, or in respect of persons temporarily transferred to the Court in accordance with article 93, paragraph 7, of the Statute or rule 193 of the Rules of Procedure and Evidence, for any acts, omissions or convictions prior to the surrender, the transfer or the appearance before the Court except as provided for in the Statute and the Rules of Procedure and Evidence.

30. The headquarters agreement should provide that the immunity provided for in paragraph 29 shall cease to have effect when the person, having been acquitted or otherwise released by the Court and having had for a reasonable period specified in the headquarters agreement after the date of his/her release an effective opportunity of leaving, has nevertheless remained in the territory of the host country or, having left it, has returned voluntarily.

Visa

31. The headquarters agreement should provide that the applications for entry and exit visas for persons taking part in proceedings of the Court are dealt with as speedily as possible and granted free of charge. It should also provide that the host Government shall make adequate arrangements by which entry and exit visas for family of detained persons are processed speedily and, where appropriate, free of charge or for a reduced fee.

Cooperation between the Court and the host country

32. Under this principle the headquarters agreement should provide that the Court and the host country are under the obligation to cooperate with each other regarding the implementation of the agreement.

33. The headquarters agreement should further provide that the Court shall cooperate at all times with the competent authorities of the host country to facilitate, to the extent possible, the proper administration of justice, secure the observance of police regulations and prevent any abuse in connection with the privileges, immunities and facilities accorded under the present agreement and that it is the duty of all persons enjoying privileges, immunities and facilities under the headquarters agreement to respect the laws and regulations of the host country.

34. The headquarters agreement should provide that the competent authorities of the host country shall take effective and adequate action to ensure the appropriate security, safety and protection of persons referred to in the agreement, which is indispensable for the proper functioning of the Court, free from interference of any kind.

35. The headquarters agreement should also include general procedural provisions concerning cooperation in operational matters such as transit, pre-trial detention and the enforcement of sentences under article 103, paragraph 4, of the Statute.

36. The headquarters agreement should provide appropriate ways and means by which the Court shall notify the competent authorities of the host country of the names and categories of persons to which the agreement shall apply.

Amendments

37. Under this principle, the headquarters agreement shall include a provision providing that the agreement may be amended by mutual consent of the parties.

Settlement of disputes

38. Under this principle, the headquarters agreement should provide that the Court shall make suitable provisions for the settlement of:

(a) Disputes arising out of contracts and other disputes of a private law character to which the Court is a party;

(b) Disputes involving officials of the Court who, by reason of their official position, enjoy immunity, if such immunity has not been waived.

39. With reference to disputes that may arise between the Court and the Government of the host country concerning the interpretation or application of the headquarters agreement or of any supplementary agreement that cannot be settled amicably, the agreement should provide that they should be referred, at the request of either party to the dispute, to an arbitral tribunal and should include provisions regarding the composition and functioning of such a tribunal.

Applicability of the headquarters agreement

40. The headquarters agreement should be without prejudice to relevant rules of international law, including international humanitarian law.